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IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. 542

JOSEPH P. BASS,

Petitioner,

vs.

BALTIMORE & OHIO TERMINAL RAILROAD
COMPANY, A CORPORATION,

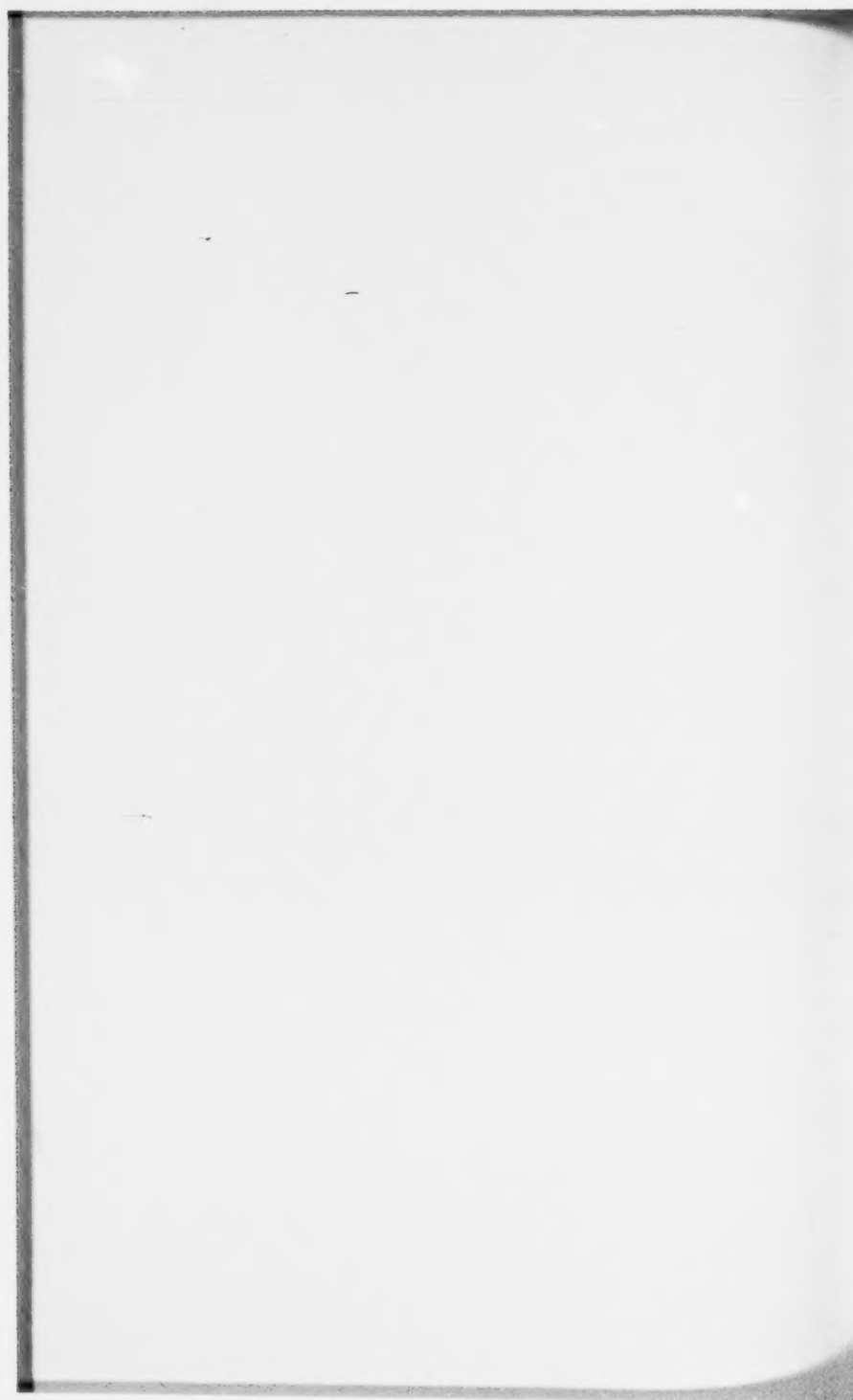
Respondent.

PETITION FOR WRIT OF CERTIORARI TO BE ADDRESSED TO
THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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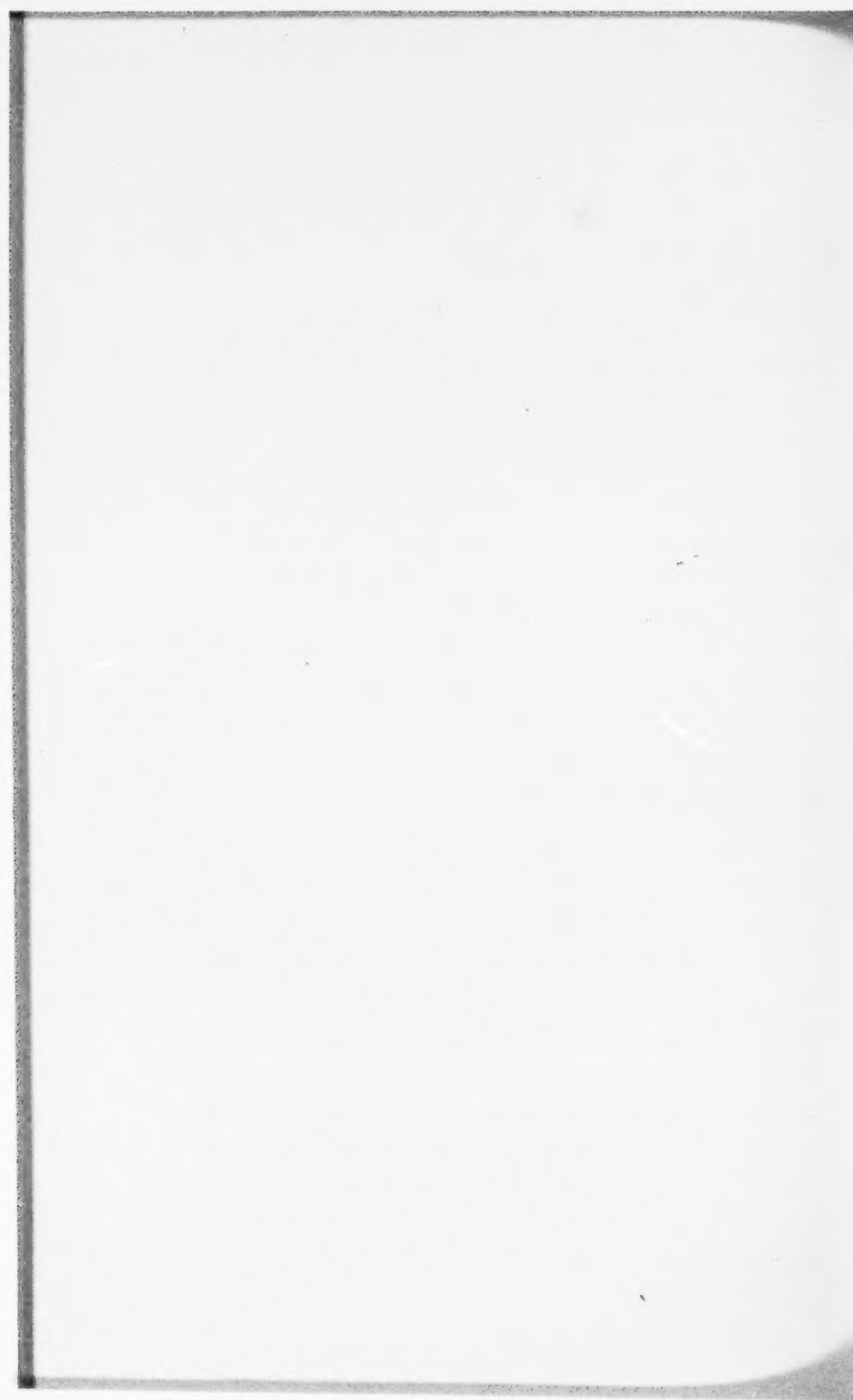


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**PETITION FOR WRIT OF CERTIORARI TO BE AD-
DRESSED TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SEVENTH CIRCUIT
AND BRIEF IN SUPPORT THEREOF.**

*To the Honorable Chief Justice and Associate Justices of
the Supreme Court of the United States:*

Your petition, Joseph P. Bass, hereinafter called the plaintiff, prays for a Writ of Certiorari to review a judgment against him in favor of the respondent, Baltimore & Ohio Terminal Railroad Company, a corporation, hereinafter referred to as defendant.

Summary and Statement of the Matter Involved.

This is an appeal from an order entered *sua sponte* dismissing plaintiff's appeal for the supposed reason that plaintiff's notice of appeal was inadequate. 142 F. (2) 779. (Tr. 183.)

The petitioner, Joseph P. Bass, the plaintiff below, brought a suit to recover damages for the loss of a leg under the Federal Employers' Liability Act against the defendant railroad company. The jury under an erroneous instruction found for the defendant. The trial court in contravention of the 1939 Amendment to the Federal Employers' Liability Act instructed the jury that the defense of assumed risk was applicable. The plaintiff appealed.

Briefs were filed by the plaintiff and defendant and the case was argued orally. The only issue raised was the error committed by the trial court in instructing the jury on the defense of assumed risk.

The notice of appeal complied substantially with all the requirements of the Rules and was filed within the three months after the denial of the motion for new trial. The notice of appeal was "from the order of Judge William H. Holly entered August 3, 1943, denying plaintiff's motion for a new trial." (Tr. 171.) The United States Circuit Court of Appeals found that there was no appeal from the judgment in the cause, the appeal being only from the order of the Court in denying motion for a new trial.

The plaintiff filed a petition for rehearing wherein he pointed out that the notice of appeal was in fact sufficient and that this position was sustained by decisions of other Circuit Courts of Appeal. At the same time, the plaintiff filed a petition asking leave to amend the notice of appeal to correct any error or insufficiency in the notice of appeal so that it would express the intention of the plaintiff. Attention was also directed to the fact that the appeal bond recited that "Joseph P. Bass, having filed in the clerk's office of the District Court, notice of appeal to the United States Circuit Court of Appeals for the Seventh District to reverse the judgment aforesaid." (Tr. 173.) But the Circuit Court of Appeals on June 29, 1944 refused

to reconsider its opinion and denied the plaintiff leave to amend the notice of appeal. This petition is filed to correct the error of the United States Circuit Court of Appeals in refusing to consider the appeal on its merits.

Statement of the Basis Upon Which This Court Has Jurisdiction to Review the Judgment.

The decision is in conflict with decisions of other Circuit Courts of Appeal on the same matter. (Rules of the Supreme Court 37-5 (b).) *United States v. Steinberg*, 100 Fed. (2) 124 (2nd Cir.) held the error was a formal mistake not affecting substantial rights; *Crump v. Hill*, 104 Fed. (2nd) 36, (5th Cir.) held a notice of appeal may be waived entirely; *Martin v. Clark*, 105 Fed. (2d) 685 (7th Cir.) Improper designation of parties inconsequential; *Milton v. United States*, 120 Fed. (2d) 794 (5th Cir.) Identical facts held to be purely technical error.

The Circuit Court of Appeals has decided an important question involving the construction of the Rules of Civil Procedure with respect to a notice of appeal, which question has not been, but ought to be settled by the Supreme Court of the United States. (Rules of the Supreme Court 37-5 (b).)

It declined to permit the plaintiff to amend his notice of appeal contrary to the provisions and intent of the Rules of Civil Procedure.

The Questions Presented and Reasons for Writ.

Inasmuch as Rule 73 of the Rules of Civil Procedure provides that "a party may appeal from a judgment by filing with the District Court a notice of appeal," therefore upon the filing of a notice of appeal, the appeal is perfected even though the notice may have been defective or insufficient in some respects. A notice of appeal is effective

to transfer jurisdiction to the Appellate Court even though it may defectively specify the parties to the judgment or the parts thereof appealed from or the name of the Court to which the appeal is taken.

There is an uncertainty of law inasmuch as other Circuit Courts of Appeals have decided the identical question in a contrary manner.

Even though the notice of appeal may have been defective in not properly describing the judgment appealed from, it was the duty of the Court to permit the plaintiff to amend the notice of appeal to conform with the appeal bond and to permit a consideration of the appeal upon its merits without regard to technical errors. The purpose of the Rules of Civil Procedure was to provide for liberality of amendment in order that causes may be considered quickly and effectually.

Prayer.

Your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Seventh Circuit to the end that case therein numbered 8480 entitled Joseph P. Bass, plaintiff-appellant, *vs.* Baltimore & Ohio Terminal Railroad Company, defendant-appellee may be brought up and received on the complete, certified record thereof and determined by this Honorable Court as and by the Statutes of the United States and the Rules of Civil Procedure provided, and that the judgment of the Circuit Court of Appeals for the Seventh Circuit be reversed and that petitioner have such other and further relief as to this Honorable Court shall seem meet and proper.

JOSEPH P. BASS,
Petitioner.

ROYAL W. IRWIN,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION.

It is provided by Rule 73 of the Rules of Civil Procedure that a party may appeal from a judgment by filing a notice of appeal. The plaintiff did file within the time allowed a notice of appeal. It may be that the notice of appeal was defective in appealing from the order denying a new trial and it probably would have been more accurate to have appealed from the judgment itself. The judgment was entered at the time the verdict was returned. The motion for new trial was denied subsequently. Therefore, the judgment did not become final until the motion for new trial was denied. Misstatements in a notice of appeal which do not affect substantial rights should be disregarded.

After the notice of appeal was filed, a complete record was transmitted to the Circuit Court of Appeals. The defendant appeared and filed a brief raising no question as to the sufficiency of the notice of appeal.

We contend that when a notice of appeal was filed, even though it may have been defective in form, for the purpose of jurisdiction, it removed the entire cause to the Appellate Court. The inadvertant description of the order denying a new trial should not have prevented the Court from considering the appeal upon the merits. No one was misled. The defendant replied to the merits. The action dismissing the appeal was taken solely on the Court's own initiative. It was the duty of the Court to have disregarded technicalities. The mere fact that the Court entered an order dismissing the appeal concedes the fact that an appeal was perfected.

The same Court in a prior case decided the identical question in the opposite manner.

In *Martin v. Clarke*, 105 Fed. (2d) 685, (7th Circuit) the Court said:

"At the outset we are met with appellee's motion to dismiss this appeal because of a misstatement of the parties in the description of the judgment appealed from, that is to say, the notice of appeal erroneously described the order appealed from as an appeal from an order of October 12, 1938, wherein the court found the issues for the defendant, whereas the judgment of the court was in fact in favor of the plaintiff and against the defendant for the sum of \$19 and costs of the suit. This was the only judgment entered by the trial court. * * *

"The object of the notice is merely to advise the opposite party that an appeal has been taken from a specific judgment in a particular case; **if the notice is plain and explicit in this particular and sufficient in all other respects, it ought not to be declared ineffectual because of some slight mistake in the description of the judgment.** Sections 472, 473, 3 Am. Jur. pp. 168 and 169. **Courts are liberal in construing the sufficiency of a notice of appeal, and, where it appears from the notice, as in the instant case, that there is sufficient information acquainting appellee as to the judgment appealed from (the appellee not being prejudiced or misled) the mere fact that the designation of plaintiff and defendant was interchanged is no ground for dismissing the appeal. Accordingly, the motion to dismiss is overruled.**" (Bold face type ours.)

It has been held by the Fifth Circuit Court of Appeals that the filing of a notice of appeal may be waived entirely and that a waiver signed by the defendant may take the place of the notice of appeal. The decision is in conflict with the decision of the Seventh Circuit.

In *Crump v. Hill*, 104 Fed. (2d) 36 (5th Circuit), it appears that no notice of appeal was filed within the required time, but in its place was filed a waiver of service thereof, appellee's acceptance of designation, and entry of ap-

pearance. It was held to be a substantial compliance with Rule 73. The Court said:

"The reason for the Rule (Rule 73), however, to set the appeal in motion by mere notice without judicial action, makes it quite clear we think that the appellant, when he procured from appellee and filed, her waiver of notice, her acceptance of designation, and her entry of appearance, just as effectively started his appeal as if he had merely filed the notice of appeal with, and left its service to the Clerk. It is true enough that the starting of an appeal within the time fixed is jurisdictional and that good practice requires conformity to the formal requirements of the Rule. **But it would, we think, be a harking back to the formalistic rigorism of an earlier and outmoded time, as well as a travesty upon justice, to hold that the extremely simple procedure required by the Rule is itself a kind of Mumbo Jumbo, and that the failure to comply formalistically with it defeats substantial rights.**" * * *

"**We think that it was substantial compliance with the letter of Rule 73 to file, instead of the notice of appeal, the waiver of service thereof and appearance thereto, but if this ruling does violate its letter, it certainly accords with and gives effect to its substance and spirit.** Indeed, it would we think be an exhibition of unsound reasoning and clear abuse of judicial discretion for us to start the Rule off barnaced with the rigid and rigorous holding appellee's motion seeks." (Bold face type ours.)

Other Courts have considered the form of notices of appeal and have held that where it appears that the error was one of form not affecting substantial rights, it is the duty of the Court to disregard the imperfection and to treat the appeal as properly before the Court.

In the case of *United States v. Steinberg*, 100 Fed. (2d) 124 (2nd Circuit), the Court said:

"The defendant appealed from a 'final order and judgment * * * entered on the 15th day of Feb-

ruary, 1936, which in substance denied his motion to vacate or modify the default judgment entered in the above entitled action on October 4, 1937.' He prayed that 'said order and judgment may be reversed and the defendant's motion aforementioned granted'."
 . . .

The plaintiff contended there could be no appeal from the order refusing to modify the judgment. But the Court said:

"The only question is whether, because of its form, it reached judgment at all. Verbally of course it did not, but it appears to us that the error was one of those formal mistakes which do not 'affect substantial rights', and which we are empowered, and indeed directed, to disregard. Section 391, Title 28, U. S. Code, 28 U. S. C. A. Paragraph 391. We hold therefore that upon this appeal, we may reconsider the original judgment, and we proceed to the merits." (Bold face type ours.)

In 6 Federal Rules Service, page 785 it is stated:

"Misdescription of the judgment appealed from is generally regarded as a matter which may be relieved against even after expiration of the time to appeal if the original notice of appeal was sufficiently definite to apprise the adverse parties of the appellant's intention. If the meaning is discernible, although the notice was 'inartificially' phrased, allowance of amendment is not an extension of the time to appeal."

The author has cited nine cases in support of this statement.

Powers of Appellate Courts.

Section 269 as amended of the Judicial Code provides:

"All United States Courts shall have power to grant new trials. On the hearing of any appeal or motion for a new trial in any case, **the Court shall give judgment after an examination of the entire record before the Court without regard to technical errors, difficul-**

ties or exceptions which do not affect the substantial rights of the parties." (Bold face type ours.)

Authorities Cited in Opinion.

In support of its position, the Circuit Court of Appeals cited the case of *Youdan v. Majestic Hotel Company*, 125 Fed. (2d) 15. Curiously, the same Judge who wrote the opinion of the case at bar wrote the opinion in *Youdan v. Majestic*. The case is not at all in point. There an appeal was taken from a *motion granting a new trial*. Let us point out that there is no provision in the Rules of Civil Procedure for an appeal from a motion granting a new trial. No judgment was entered in the case from which an appeal might be taken. There was a very severe attempt made before the Advisory Committee to include in the rules a provision for an appeal from an order granting a new trial. It was beaten and this Court did not include in the rules such a provision. The case, therefore, should not be considered as an authority.

The same is true with reference to the case of *Marshall v. Cashman*, 111 Fed. (2d) 140, cited by the Court. The error assigned was the abuse of discretion of the trial court in granting a new trial.

In support of its position, the Court also cited *Fairmont Glass Works v. Coal Company*, 287 U. S. 474. **This case was decided January 9, 1933, several years before the adoption of the Rules of Civil Procedure**, at a time when a notice of appeal was unknown. Manifestly this case cannot be considered an authority in the construction of the Rules of Civil Procedure. (Bold face type ours.)

Pfister v. Finance Corporation, 317 U. S. 144, also cited is a bankruptcy case based upon bankruptcy law and cannot be considered as an authority in civil matters.

Plaintiff's Right to Amend.

Even if it be conceded that the notice of appeal was insufficient, it was the duty of the Court to have allowed plaintiff's motion for leave to amend. The Rules of Civil Procedure provide for liberal amendments. If there were a substantial compliance, it was the duty of the Court to have permitted the plaintiff to amend the notice of appeal. It was an abuse of discretion to refuse. The processes of appeal are an extremely simple procedure and it was not intended that a failure to comply with the rules to the exact letter should defeat substantial rights. It has been held that it is not even necessary to file a notice of appeal where a proper waiver of notice of appeal has been filed. The notice of appeal ought not to be declared ineffectual because of some mistake not affecting substance. It was the duty of the Court to permit an amendment of the notice that it might express the intention of the parties as shown otherwise by the record.

Respectfully submitted,

ROYAL W. IRWIN,
Attorney for Petitioner-Plaintiff.

